Supreme Co
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No. _____

In the Supreme Court of the United States

MICHELLE SMITH

Petitioner,

v.

NORMA ALICE JONES, ACTING IN HER CAPACITY AS PRESIDENT, AND GAYNELL L. PITTMAN, ACTING IN HER CAPACITY AS TREASURER OF THE MAUK-CHARING-NORWICH COMMUNITY CLUB, AN UNINCORPORATED ASSOCIATION OF NATURAL PERSONS RESIDING IN THE STATE OF GEORGIA, COUNTY OF TAYLOR

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Pro Se Petitioner

QUESTIONS PRESENTED

1. Does a direct conflict exist between the 11th Circuit Court of Appeals' arbitrary dismissal of a case as frivolous and the U.S. Supreme Court's holding in Barefoot v. Estelle, 463 U.S. 880 (1983) when the issue before the 11th Circuit of whether section 1985 (3) of 42 U.S.C. § 1985 (3) classifies as an equal civil rights statute for the purpose of removal has not been squarely foreclosed by authoritative court decision because the issue before the 11th Circuit was one of first impression?

2. Does a direct conflict exist between the 11th Circuit Court of Appeals' holding that an arbitrary dismissal of a removed civil rights case to federal court is frivolous for lack of evidence on appeal when the District Court failed to require or allow an evidentiary hearing, in conflict with U.S. v. Rachel, 384 U.S. 780 (1966)?

3. Does a direct conflict exist between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand?

RULE 29.6 STATEMENT AND INTERESTED PERSONS

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non-wholly owned subsidiaries.

The following persons have an interest in the outcome of this litigation: Lovick P. Anthony, Jr., Attorney for the Mauk-Charing-Norwich Community Club; Edward Davis, Attorney for the Taylor County Board of Education; Norma Alice Jones, President, Mauk-Charing-Norwich Community Club; Judge Clay Land, District Court Judge, Middle District of Georgia; Gregory J. Leonard, District Court Clerk, Middle District of Georgia; Mauk-Charing-Norwich Community Club; W. Donald Morgan; Attorney for the Mauk-Charing Norwich Community Club; Gaynell Pittman, Treasurer, Mauk-Charing-Norwich Community Club; Michelle Smith, Petitioner; Taylor County Board of Education.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

The court of appeals' judgment was entered on July 3, 2003. A timely request for a rehearing was denied on August 6, 2003. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1985 (3); Federal Rules of Civil Procedure

STATEMENT

This case arises out of a removed case from Superior Court to District Court with removal based on civil rights. The petitioner is a new attorney who represented blacks and other poor minorities in a small, rural Georgia town. The attorney became the target of harassment that started with a rattlesnake being placed in the attorney's office, then later escalating into her historic, 100 year old family home place being destroyed by arson later attributed to a member of an all white "community club."

The club produced an apparent fraudulent deed alleging the club ownership in the office that the petitioner owned and occupied. The respondents sued the petitioner and she removed to District Court and countersued for racketeering and defamation. The club failed to respond to the complaint and in defiance of judicial process, in a Ku-Klux-Klan-like manner took over the attorney's building by force and refused her access to her building.

The petitioner obtained default against the respondents but the District Court overturned the default, denied default judgment, and remanded the case back to Taylor County Superior Court without any evidentiary hearing. The 11th Circuit Court of Appeals dismissed the case as frivolous even

though the 11th Circuit had not previously decided whether or not section 1985(3) qualifies as an equal civil rights statute for the purpose of removal.

Taylor County has a long history of racial discord, most recently highlighted with the national exposure of the dual black and white proms held each year.

This case raises important, recurring questions relating to frivolous appeals and evidentiary hearings for removed cases before remand. The 11th Circuit's decision is in direct conflict with the U.S. Supreme Court. This case while important to the parties raises issues distinguished more by the importance of the issues to the public. Many areas of the country are still plagued by racial discord and cases are removed to alleviate that bias. If the cases can be arbitrarily dismissed on appeal without proper evidentiary foundation from an evidentiary hearing, then many with these recurring racial problems are essentially without proper redress.

REASONS FOR GRANTING THE PETITION

A DIRECT CONFLICT WITH RULING IN BAREFOOT V. ESTELLE

A direct conflict exists between the 11th Circuit and Barefoot v. Estelle, 463 U.S. 880 (1983). The Supreme Court has stated that an issue is frivolous if it "squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case." Barefoot at 894.

The 11th Circuit has not specifically addressed whether 42 U.S.C. § 1985 (3) qualifies as "an equal civil rights" statute. Alabama v. Conley, 245 F.3d 1292, 1296 (11th Cir. 2001). Because the 11th Circuit had not specifically addressed whether § 1985 (3) qualifies as an equal civil rights statute, the issue in the present case was one of first impression. Since it was a case of first impression, then the 11th Circuit's ruling as frivolous was in direct conflict with the Barefoot opinion.

Courts in Conflict Regarding Definition of a Frivolous Appeal

A frivolous appeal is defined as one that pursues legal points not arguable on the merits. Ozee v. American Council on Gift Annuities, Inc. 110 F. 3d 1082, 1097 (5th Cir. 1997). Appeal based on colorable reading of case law is not frivolous. Edwards v. Cass County, 919 F.2d 273, 276 (5th Cir. 1990). Some courts admit that they cannot easily define that which is frivolous. "Frivolity, like obscenity, is often difficult to define." WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983) A weak appeal is not a frivolous appeal. Hetreed v. Allstate Ins. Co. , 135 F. 3d 1155, 1158 (7th Cir. 1998).

The conflict regarding the definition of frivolous appeals is significant because it has far-reaching legal and practical effects. Many cases are without proper redress. A Court of Appeals should have the authority to clear out its docket but not at the expense of dismissing claims without first ascertaining whether or not there are arguable legal merits not clearly foreclosed by case or statute. Further, many appeals are appeals of first impression, while many appeals call for the Court of Appeals to overturn its previous holding to create new case law.

Without clear guidelines regarding how a case is deemed frivolous, the dismissal of many worthy appeals as frivolous will proceed because these appeals have no final redress.

A DIRECT CONFLICT WITH RULING IN STATE OF GEORGIA V. RACHEL

A direct conflict exists with the 11th Circuit Court of Appeals and State of Georgia v. Rachel, 384 U.S. 780, 792 (1966) because Rachel requires a hearing to establish the evidence sufficient to sustain removal. The District Court did not hold an evidentiary hearing and the 11th Circuit in direct conflict with Rachel dismissed this argument.

An oral argument was held on November 12, 2002 in District Court, but Judge Land only heard oral arguments and did not allow an evidentiary

hearing, the District Court could not properly determine whether there was sufficient evidence to sustain or deny removal. The court called the petitioner's attention to the Rules of Evidence. But per the persuasive precedent of the 7th Circuit in Borowski v. DePuy, Inc., 850 F.2d 297, 306 (7th Cir. 1988), the petitioner cannot supplement the record with documents that were not part of the district court record.

Petitioner/Defendant/Smith (Smith) asked the District Court for permission to present evidence of the Club Members committing arson to the defendant's home place at the oral argument on November 12, 2002, but Smith's request to present the evidence from the certified arson investigator was denied both as to presenting the evidence in open court or in chambers. There is no record of this conversation from the case record because no court reporter was present at the oral argument. The court did ask Smith if the incidents and the evidence she had obtained through a private arson investigator and forensic document examiner had been turned over to the appropriate authorities. Smith replied that the evidence had been turned over to the Federal Bureau of Investigations as well as the United States Attorney's Office.

Smith did not present the information of the conversation between Smith and the District Court Judge from the November 12, 2002 hearing to the 11th Circuit Court of Appeals because this information had never appeared in the record previously, and to do so would have been frivolous. The defendant at all times was deferential and conscientious in her respect to the court by not submitting information to the court that had not previously been incorporated into the District Court Record either by sworn statements of affidavits or court transcript.

Decision Not to Have an Evidentiary Hearing Incorrect

The decision to not have an evidentiary hearing is incorrect. This particular case squarely presents the inherent conflict of not having an evidentiary hearing before making a ruling regarding a remand from a civil rights removal.

This Court should clarify by a bright line ruling whether or not Rachel in fact requires an evidentiary hearing prior to a

court making a determination to remand. Without a definitive ruling, many removed cases based on civil rights will be remanded back without a hearing to properly determine whether or not the cases established an adequate evidentiary burden to stay in federal court under the civil rights statute.

The country is still polarized by racial bias and racial divide. The present case shows how polarized one community is in regards to race. Taylor County may be a novelty with its dual black and white proms, but it is hardly a novelty with racial prejudice. Racial prejudice exists throughout the country and many times the only way even handed justice comes is by a defendant removing a case to federal court pursuant to his or her civil rights.

A DIRECT CONFLICT WITH FEDERAL RULES OF CIVIL PROCEDURE

A direct conflict exists between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand. The Federal Rules of Civil Procedure do not toll the answer of a counterclaim when filing a motion to remand. Default by reckless disregard for judicial proceedings should preclude the finding of relief from the default, and further warrants a default judgment.

In the present case, the entry of default and default judgment are warranted because the club disregarded FRCP 12 by failing to file an answer to the counterclaim, and otherwise exhibited a calculated, callous, willful, reckless, deliberate disregard for the judicial process. The 11th Circuit Court of Appeals has noted that if a party willfully defaults by displaying either an intentional or reckless disregard for the judicial proceedings, the court need make no other findings in denying relief. Compania Interamericana v. Compania Dominicana, 88 F.3d at 951-952 (11th Cir. 1996). At the time of the default, removal was proper.

A Motion to Remand Does Not Toll the Answer of a Counterclaim

The Federal Rules of Civil Procedure do not toll the answer of a counterclaim when filing a motion to remand. If a Court of Appeals can supercede the Rules of Civil Procedure, then there is no continuity and stability for all judicial proceedings. A counterclaim cannot establish jurisdiction in federal court. But until jurisdiction is found to be incorrect by the court by an order of remand, then jurisdiction is proper and an answer is required.

When an answer is not filed and default is entered, the default should stand irrespective of whether or not the case is remanded back to another jurisdiction. At the time of the default, jurisdiction is proper. To rule or hold otherwise under scores the necessity for strict rules within the judicial process.

This Court should affirmatively state that a motion for remand does not toll the Federal Rules of Civil Procedure in answering a counterclaim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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A. (1) 11th Circuit Denial of Reconsideration.....1a

August 6, 2003

(2) 11th Circuit Dismissal of Appeal 2a

July 3, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

02-16696

NORMA ALICE JONES, acting in her capacity as President of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor, GAYNELL L. PITTMAN, acting in her capacity as Treasurer of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor,

Plaintiffs-Appellees, Counter-Defendants,
versus

BONNIE MICHELLE SMITH,

Defendant-Appellant, Counter-Claimant.

On Appeal from the United States District Court for the Middle District of Georgia

BEFORE: BIRCH, DUBINA, and WILSON, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of the Court's July 3, 2003, order dismissing this appeal as frivolous is DENIED.

Filed August 6, 2003, Thomas K. Kahn, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

02-16696

NORMA ALICE JONES, acting in her capacity as President of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor, GAYNELL L. PITTMAN, acting in her capacity as Treasurer of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor,

versus

Plaintiffs-Appellees, Counter-Defendants,

BONNIE MICHELLE SMITH,

Defendant-Appellant, Counter-Claimant.

On Appeal from the United States District Court for the Middle District of Georgia

BEFORE: DUBINA, BARKETT, and MARCUS, Circuit Judges.

BY THE COURT:

The Court has reviewed Appellant's response to the order to show cause why she should not be sanctioned pursuant to 11th Cir. R. 27-4 for filing a frivolous motion, as defined in subparagraphs (a) and (b) of Rule 27-4.. Although we refrain from imposing sanctions against Appellant, we admonish her to familiarize herself with Fed.R.Civ.P. 11 and the Federal Rules of Evidence. On its own motion, the Court DISMISSES this appeal as frivolous and entirely without merit. SEE 11th Cir. R. 42-4.

Filed July 3, 2003, Thomas K. Kahn, Clerk.

(2)

Supreme Court, U.S.
FILED
OCT 30 2003
OFFICE OF THE CLERK

No. 03-948

In the Supreme Court of the United States

MICHELLE SMITH

Petitioner,

v.

NORMA ALICE JONES, ACTING IN HER CAPACITY AS PRESIDENT, AND GAYNELL L. PITTMAN, ACTING IN HER CAPACITY AS TREASURER OF THE MAUK-CHARING-NORWICH COMMUNITY CLUB, AN UNINCORPORATED ASSOCIATION OF NATURAL PERSON RESIDING IN THE STATE OF GEORGIA, COUNTY OF TAYLOR

Respondents

SUPPLEMENTAL APPENDIX

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November 15, 2002

B. Petition for Removal 11

July 29, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

NORMA ALICE JONES, acting in her capacity as President, and GAYNELL L. PITTMAN, acting in her capacity as Treasurer, of the Mauk-Charing-Norwich Community Club,	*	FILED U.S. DISTRICT COURT MIDDLE GEORGIA 02 NOV 18 AM10:47 s/ DEPUTY CLERK
Plaintiffs	*	
vs.	*	Case No. 4:02-CV-117-3 (CDL)
TAYLOR COUNTY BOARD OF EDUCATION and BONNIE MICHELLE SMITH,	*	
Defendants	*	

ORDER

The Court presently has pending before it Plaintiffs' Motion to Remand, Plaintiffs' Motion to Set Aside the Clerk's Entry of Default, and Defendant Smith's Motion for Default Judgment. For the reasons set forth below, the Court grants Plaintiffs' Motion to Remand and Motion to Set Aside the Clerk's Entry of Default. Given the Court's granting of these motions, Defendant Smith's Motion for Default Judgment is denied as moot.

PROCEDURAL BACKGROUND

This case is before the Court after having been removed to this Court by Defendant Smith. This case originated in the Superior Court of Taylor County, Georgia, when Plaintiffs, Norma Alice Jones and Gaynell L. Pittman, acting in their capacity as officers of the Mauk-Charing-Norwich Community Club (hereinafter "Plaintiffs" or "MCNC Club"), filed suit, seeking injunctive relief and a declaration that a deed from Defendant Taylor County Board of Education (the "Board of Education") to Defendant, Michelle Smith, (hereinafter "Defendant" or "Smith") (Footnote 1) was null and void.

This case arises from a dispute over whether a deed transferring a reversionary interest from the Board of Education to Smith is valid or whether that deed is void because of an earlier transfer of the same interest from the Board of Education to the MCNC Club. Smith (Footnote 2) subsequently sought to remove the case to this Court, claiming that the case involves questions of federal law, thus authorizing subject matter jurisdiction. After removing the case to this Court, Smith filed an answer and a counterclaim. In her counterclaim, Smith asserts claims for relief under the federal RICO statute (Count I) and Georgia's defamation and libel law (Count II). Smith also maintains that allowing the case to proceed in state court will result in a denial of her civil rights. Moreover, she contends that Plaintiffs' claims can more fairly be characterized as claims under the federal National Historic Preservation Act, 16 U.S.C. § 470 et seq., thus providing another ground for federal subject matter jurisdiction. Upon receiving notice that the case was removed to federal court, Plaintiffs filed a Motion to Remand based on lack of subject matter jurisdiction. Smith responded to this motion and subsequently filed a Motion for Entry of Default based on Plaintiffs' failure to respond to her counterclaim. Since Plaintiffs filed no answer to the counterclaim within twenty days of the service date, the Clerk made an entry of default, which entry Plaintiffs now seek to set aside.

After the Clerk's entry of default, Smith filed a Motion for Default Judgment and for a Hearing for Assessment of Damages. The Court held a hearing on November 12, 2002, on Plaintiffs' Motion to Remand, Plaintiffs' Motion to Set Aside Clerk's Entry of Default, and Defendant's Motion for Default Judgment.

DISCUSSION

A. Plaintiffs' Motion to Remand

Smith asserts four separate grounds for subject matter jurisdiction in this case. First she contends that her federal RICO counterclaim involves a question of federal law authorizing federal question jurisdiction. Second, she argues that allowing this mater to remain in state court will result in a denial of her civil rights, requiring that removal be permitted pursuant to 28 U.S.C. § 1443(1). Third, Smith maintains that this case is removable under 28 U.S.C. § 1443(2), which permits federal jurisdiction in a limited category of cases involving federal officials. Finally, Smith contends that the true nature of Plaintiffs' claims involving federal law issues which Plaintiffs have artfully disguised in their pleading to avoid federal jurisdiction, and therefore, the case is removable under 28 U.S.C. § 1441. For the reasons set forth below, each of Smith's arguments for federal jurisdiction must be rejected. Accordingly, the case is remanded to the Superior Court of Taylor County, Georgia.

1. Smith's Counterclaim

It is clear that Smith's federal RICO count included in her counterclaim cannot create subject matter jurisdiction in this Court. The Supreme Court has held that a counterclaim involving a federal question cannot serve as a basis for removal, just as a federal defense cannot. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1893-94 (2002) ("(A) counterclaim . . . cannot serve as the basis for 'arising under' jurisdiction."). Therefore, it is beyond dispute that Smith's counterclaim on its face provides no basis for federal jurisdiction.

2. Removal Under 28 U.S.C. § 1443(1)

Defendant's primary contention is that this case is properly removable under 28 U.S.C. § 1443(1). Section 1443(1) provides that a case may be removed to federal court where a "person . . . is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States . . . ." § 1443(1). Smith contends that if she is required to litigate this case in the Superior Court of Taylor County, Georgia, that her civil rights will be denied. The Supreme Court, in Georgia v. Rachel, 384 U.S. 780, 788 (1966), set forth a two-prong test ("the Rachel test") for removal under this statutory provision. In order to remove a case under § 1443(1), a defendant must show "both that the right upon which they rely is a 'right under any law providing for . . . equal civil rights' and that they are 'denied or cannot enforce' that right" in state court. Id.

Smith claims that she is being denied her civil rights under 42 U.S.C. § 1985 (3), which, in essence, makes it illegal to conspire to deny another person equal protection under the law. Thus, in order to warrant removal, Smith must show that § 1985 (3) satisfies both prongs of the Rachel test. Assuming arguendo that § 1985(3) is an "equal civil rights" statute thus satisfying the first prong of the Rachel test, the recent Eleventh Circuit case, *Alabama v. Conley, 245 F. 3d 1292 (11th Cir. 2001), makes it clear that Smith cannot satisfy the second* prong of Rachel. (Footnote 3) Therefore, the case is not removable pursuant to § 1443(1).

In *Alabama v. Conley*, the plaintiff filed an eminent domain action in state court seeking to condemn various parcels of land owned by the defendant. Id. at 1293. The defendant removed the case to federal court. The district court granted the plaintiff's motion to remand, and the court of appeals affirmed. Id. While the Eleventh Circuit Court of Appeals assumed § 1985(3) met the first prong of the Rachel test, it held that the statute did not contain a specific provision that insulated the defendant from an eminent domain proceeding in state court. Id. at 1298. Specifically, the court found that, unlike the Civil Rights Act of 1964 at issue in the

Rachel case, which provided a specific right to trespass when making a peaceful attempt to be served on an equal basis in establishments covered by the Act, no similarly explicit prohibition against proceedings in state court based on the defendant's actions is provided for in Section 1985(3). Id. at 1296-98. In other words, there was no conflict between the state eminent domain law and Section 1985(3).

Applying that rationale to the present case, it is clear that this case is not removable under § 1443(1). Plaintiffs' right to institute a quiet title action in state court does not conflict with § 1985(3), which contains no explicit prohibition on this type of suit. The Conley case also explicitly mandated that a defendant's allegations that he or she cannot receive a fair trial in a particular state court does not mean removal should be granted under § 1443(1). Id. at 1298-99. Rather, the Supreme Court "has made clear" that this is not the case. Id. Thus, Defendant's allegations that the Superior Court in Taylor County is hostile toward African-Americans do not provide her with a basis for removal. (Footnote 4) The Supreme Court has held that in such instances, if a defendant is indeed discriminated against or otherwise harmed in his or her pursuit of justice in state court, there are other avenues to vindication which are more proper than removal, including filing a separate suit. See *City of Greenwood v. Peacock*, 384 U.S. 808, 827-31 (1966) (discussing various remedies available to a defendant whose rights are not vindicated in state court). In particular, the Court stated:

> It is not enough to support removal under § 1443(1) to allege . . . that the defendant's equal civil rights have been . . . denied by state administrative officials in advance of trial . . . or that the defendant is unable to obtain a fair trial in a particular state court . . . . The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial.

Id. at 827-28. This language has been cited with approval by the courts in this circuit. See, e.g., *Alabama v. Conley*, 245

F.3d 1292, 1297 (11th Cir. 2001); *Perkins v. Mississippi*, 455 F. 2d 7, 34 n.63 (5th Cir. 1972). (Footnote 5)

Based on the foregoing, the Court finds that Smith cannot satisfy the second prong of the Rachel test, and therefore, this case is not removable pursuant to 28 U.S.C. § 1443(1).

3. Removal Under 28 U.S.C. § 1442(2)

Smith next maintains that the suit is removable under 28 U.S.C. § 1443(2), an argument that reveals either a complete misunderstanding of the law or a bold willingness to expose oneself to Rule 11 sanctions. The Supreme Court has made very clear that this statute applies only to federal officers and persons assisting such officers in their official duties. Peacock, 384 U.S. at 815-24. Since no federal officers are involved in this case, § 1443(2) provides no basis for federal jurisdiction, even under the most strained or imaginative application.

4. Exception to the Well-Pleaded Complaint Rule

Finally, Smith argues that Plaintiffs truly assert a federal claim but have cleverly disguised it to avoid federal jurisdiction. As a general rule, a plaintiff is the master of his complaint and may choose not to proceed in federal court by pursuing state law claims to the exclusion of possible federal law claims. See, e.g., *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). However, an independent corollary to this rule provides that a plaintiff cannot defeat removal by failing to plead a necessary federal question. *Franchise Tax Bd. V. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23-25 (1983). This exception, also referred to as the "artful pleading doctrine," allows removal where federal law completely preempts a plaintiff's state law claim. Rivet v. Regions Bank, 522 U.S. 470, 475 (1998).

In the case at bar, Smith claims that Plaintiffs' failure to bring suit is based upon the MCNC Club's objection to the property in question being put on the National Historic Register. Therefore, Smith maintains, the case falls within an exception to the well-pleaded complaint rule and is properly removable under 28 U.S.C. § 1441.

However, she points to no federal statute that completely preempts this state lawsuit to quiet title, undoubtedly because

no such statute exists. (Footnote 6) The Court finds that the artful pleading doctrine provides no basis for federal jurisdiction in this case, and therefore, the case is not removable under 28 U.S.C. § 1441.

To summarize, no basis exists for this Court to exercise federal subject matter jurisdiction over this case. Accordingly, Plaintiff's Motion to Remand is granted, and this case is remanded to the Superior Court of Taylor County, Georgia.

B. Plaintiffs' Motion for Costs

Plaintiffs, in their Motion for Remand, seek to recover their costs, including attorneys' fees, under 28 U.S.C. § 1447(c), claiming removal was clearly not authorized. The award of costs under Section 1447(c) falls within the sound discretion of the trial court. Although the Court is tempted to assess costs against Smith based upon the weakness of her arguments in support of removal, the Court will give her the benefit of the doubt, finding that she had at least one good faith and arguably plausible, albeit weak, ground for removal. Accordingly, the Court declines to award costs to Plaintiffs.

C. Plaintiffs' Motion to Set Aside Clerk's Entry of Default

Although the Court orders that this case be remanded, the Court finds for the sake of judicial economy that it should rule on Plaintiffs' Motion to Set Aside Clerk's Entry of Default prior to remand. For the reasons set forth below, the Court grants Plaintiffs' motion.

Smith moved for an entry of default under Fed. R. Civ. P. 55(a) after Plaintiffs failed to answer her counterclaim in a timely manner. The clerk subsequently made such an entry. Under Fed. R. Civ. P. 55(c), the Court may set aside an entry of default "for good cause shown." The Eleventh Circuit Court of Appeals has described three factors that should be considered: (1) whether the default was willful or culpable; (2) whether a set aside would prejudice the non-defaulting party; and (3) whether the party in default has a meritorious defense. *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996).

The Federal Rules of Civil Procedure recognize that when a Defendant makes a preliminary motion that may dispose of a complaint the Defendant should not be required to file an answer to the complaint until after the motion has been disposed of or the court orders that an answer be filed. See Fed. R. Civ. P. 12(a) (4). This rule, however, does not apply to motions to remand. Nevertheless, in the spirit of that rule, the Court finds that under the circumstances of this case where the motion to remand was filed based upon an alleged lack of subject matter jurisdiction, Plaintiffs should have been excused from filing an answer to the counterclaim until their motion to remand was decided. (Footnote 7) Therefore, the Court finds that good cause exists to set aside the clerk's entry of default. The Court further notes that Plaintiffs clearly had a meritorious defense based upon lack of subject matter jurisdiction as recognized by the Court's granting of Plaintiffs' motion to remand. Accordingly, Plaintiffs' Motion to Set Aside the Clerk's Entry of Default is granted.

D. Defendant's Motion for Default Judgment

In light of the Court's granting of Plaintiffs' Motion to Remand and Motion to Set Aside Entry of Default, the Court finds that Defendant's Motion for Default Judgment is rendered moot and is therefore denied.

CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' Motion to Remand and Plaintiffs' Motion to Set Aside the Clerk's Entry of Default. The Court denies Smith's Motion for Default Judgment. Accordingly, this case is hereby remanded to the Superior Court of Taylor County, Georgia.

IT IS SO ORDERED, this 15th day of November, 2002.

/s/
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
November 19, 2002

/s/
Gregory J. Leonard, Clerk

(Footnote 1) Smith is an attorney proceeding pro se in this matter. The liberal construction generally given to pro se litigants is not available to attorneys who choose to represent themselves. See, e. g., *Olivares v. Martin*, 555 F.2d 1192, 1194 n.l (5th Cir. 1977).

(Footnote 2) The Board of Education did not join Smith's motion for removal.

(Footnote 3) The Court has been unable to find any case conclusively deciding whether Section 1985(3) qualifies as an "equal civil rights" statute. The courts that have considered the question have made the assumption that it was such a statute and proceeded with an analysis of whether the second Prong of the Rachel test was satisfied. See, e.g., Alabama v. Conley, 245 F.3d 1292 (11th Cir. 2001); Davis v. Glannon, 107 F. 3d 1044 (3rd Cir. 1997); Bd. Of Educ. V. Am. Fed'n of State,

County and Mun. Employees, AFL-CIO, 401 F. Supp. 687 (N.D. Ga. 1975).

(Footnote 4) Smith herself is Caucasian. She bases her claims of hostility principally on the potential animus in Taylor County toward her clients, who are primarily poor African-American individuals, and the possible ill-effects she might face as a result of representing such individuals in this environment. Whether such an argument entitles Smith to raise a claim for a denial of her civil rights need not be decided in this case and the Court expresses no opinion on the merits of such an argument.

(Footnote 5) The Eleventh Circuit adopted the decisions of the former Fifth Circuit rendered prior to October 1, 1981, in Bonner v. City of Prichard, 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc).

(Footnote 6) Smith once again tests the Court's general reluctance to impose Rule 11 sanctions. Smith's contention is particularly disturbing given the fact that no evidence exists apart from her own self-serving statements that Plaintiffs even oppose the property being placed on the National Historic Register. Moreover, the case cited by Smith in support of her untenable position, *Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank*, 497 F. Supp. 504 (N.D. Ala. 1980), is completely inapposite.

(Footnote 7) *Accord Ritts v. Dealers Alliance Credit Corp.*, 989 F. Supp. 1475 (N.D. Ga. 1997).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

NORMA ALICE JONES, acting in her capacity as President, and GAYNELL L. PITTMAN, acting in her capacity as Treasurer, of the Mauk-Charing-Norwich Community Club, an unicorporated association of natural persons residing in the State of Georgia, County of Taylor, Plaintiff, vs. THE TAYLOR COUNTY BOARD OF EDUCATION and MICHELLE SMITH, Defendant	)	Case No.: PETITION FOR REMOVAL

PETITION FOR REMOVAL

Petitioner, a defendant in the above styled action and an attorney admitted to practice in the United States District Court, Middle District of Georgia, respectfully shows the Court:

1. The above-entitled action was commenced in the Superior Court of Taylor County, State of Georgia, on July 3, 2002, served on Defendant, Michelle Smith, on July 25, 2002, and is now pending in that court under a Rule Nisi for the action to be heard on July 30, 2002.
2. Petitioner was served with summons and a copy of plaintiff's complaint and Rule Nisi on July 25, 2002.
3. The action is a civil action to set aside a deed.
4. Thirty days have not yet expired since the action became removable to this court.

5. The above-entitled civil action against petitioner in the Taylor County Superior Court may be removed to this Court pursuant to 28 U.S.C. § 1443 (1), 28 U.S.C. § 1443 (2), 42 U.S.C. § 1985 (2), 42 U.S.C. § 1985 (3), and an exception to the well-pleaded complaint rule on the grounds that the petitioner is and has been denied rights and privileges secured and guaranteed by the laws providing for equal rights of citizens of the United States, including the right to the enjoyment and use of defendant's own property, and that the real nature of the plaintiff's claim does nor arise out of state law but under federal law, 16 U.S.C. § 470 et. seq.
6. Such denial of the above listed rights has occurred and continues to occur in the denial of defendant's rights in that :
    (a) Members of the MCN Club have performed various acts of intimidation since the filing of the lawsuit on July 3, 2002, including:
        (1) Norma Alice Jones, and Gaynell L. Pittman, plaintiffs in the action, on Sunday, July 13, 2002 , concealed their identity in disguise, stalking plaintiff, Michelle Smith, at the Mauk Schoolhouse with the purpose of depriving the defendant of her use and enjoyment of her property. The Taylor County Sheriff's Office responded to the call.
        (2) A fire destroyed the historic 1912 Harbuck Home Place in Mauk, Georgia of which defendant is an heir in the early morning hours of Thursday, July 11, 2002. Defendant is only scheduled to be at the Mauk Schoolhouse Office on Thursdays. This historic home was en route to Defendant's Office.
        (3) Norma Alice Jones, plaintiff, filed a frivolous and baseless grievance against the plaintiff with the State Bar

of Georgia on July 10, 2002 with the purpose of intimidating the defendant.

(4) Prior to the filing of the complaint on July 3, 2002, on Thursday, June 6, 2002, a rattlesnake was deliberately placed in an area of the Schoolhouse where the defendant has access. The rattlesnake was placed in the building in a paper sack after the defendant refused to deed the Mauk Schoolhouse property over to the plaintiffs.

7. Notice of the removal does not specifically include the Defendant, Taylor County Board of Education in the joinder of the removal because if removal is based on a specific statutory authority for removal then only those defendants to the removable claim must join in the removal notice.
8. The defendant, Michelle Smith, is an attorney in the Chattahoochee Circuit who represents poor, rural clients, both black and white. Her full name is Bonnie Michelle Smith.
9. The defendant, Michelle Smith, has hired black contractors and black landscape contractors to assist with the building during her ownership. Prior to defendant's ownership all contractors had been white.
10. The defendant, Michelle Smith, has asked the Chattahoochee Circuit to excuse her from all criminal appointments for fear of her personal safety.
11. The Taylor County Courthouse in Butler, Georgia does not have adequate security or metal detectors to ensure defendant's safety in open court on July 30, 2002.
12. The defendant is further denied or cannot enforce her rights to defend her action in state court for fear of her personal safety in state court.

13. Copies of all pleadings, process, and orders served on the petitioner in the action are attached and marked Exhibit A.

WHEREFORE, petitioner prays that the above-entitled action be removed from the Superior Court of Taylor County, State of Georgia, to the United StateS District Court for the Middle District of Georgia, Columbus Division.

Dated this 29th day of July, 2002

/s/_____

Bonnie Michelle Smith
Georgia Bar No. 654848
Defendant and Attorney
Representing Self Pro-Se
789 Highway 96
Suite 2C-209
Bonaire, GA 31005
(478) 397-6984
msmith158@juno.com

STATE OF GEORGIA)
COUNTY OF HOUSTON)

I, Michelle Smith, being first duly sworn, say that I am the defendant in the above-described action, and that the above petition is true and correct, dated this July 29, 2002.

/s/_____
Michelle Smith

/s/_____
Notary Public

My commission expires:_____

(NOTARIAL SEAL)

Filed and entered into the District Court Docket July 29, 2002.

Supreme Court, U.S.
FILED
MAR 4 - 2004
OFFICE OF THE CLERK

(3)

NO. 03-948

In The

Supreme Court of the United States

MICHELLE SMITH,

Petitioner,

v.

NORMA ALICE JONES, ACTING IN HER CAPACITY AS PRESIDENT, AND GAYNELL L. PITTMAN, ACTING IN HER CAPACITY AS TREASURER OF THE MAUK-CHARING NORWICH COMMUNITY CLUB, AN UNINCORPORATED ASSOCIATION OF NATURAL PERSONS RESIDING IN THE STATE OF GEORGIA, COUNTY OF TAYLOR,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. The following three (3) questions are raised by Petitioner:

1. Does a direct conflict exist between the 11th Circuit Court of Appeals' arbitrary dismissal of a case as frivolous and the U.S. Supreme Court's holding in *Barefoot v. Estelle*, 463 U.S. 880 (1983) when the issue before the 11th Circuit of whether section 1985 (3) of 42 U.S.C. §1985 (3) classifies as an equal rights statute for the purpose of removal has not been squarely foreclosed by authoritative court decision because the issue before the 11th Circuit was one of first impression?

2. Does a direct conflict exist between the 11th Circuit Court of Appeals' holding that an arbitrary dismissal of a removed civil rights case to federal court is frivolous for lack of evidence on appeal when the District Court failed to require or allow an evidentiary hearing, in conflict with *U.S. v. Rachel*, 384 U.S. 780 (1966)?

3. Does a direct conflict exist between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand?

B. In order to reach these questions, the Court would first need to answer the following questions:

1. With respect to Petitioner's first question and in light of the facts of this case, is it necessary to even determine whether 42 U.S.C. §1985(3) is an "equal civil rights" statute?

2. With respect to Petitioner's second question, did the District Court hold a hearing with regard to remand of the Petitioner's removed action?

3. With respect to Petitioner's third question, does the Court even have jurisdiction to consider a non-final judgment of a District Court's setting aside a Clerk's entry of default with regard to the Petitioner's counterclaim?

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STATEMENT OF THE CASE

The instant case was begun by the filing on July 3, 2002, in the Superior Court of Taylor County, Georgia, of a complaint by Norma Alice Jones and others in their capacities as officers of an unincorporated association known as the MCN Club (hereinafter "MCN Club") against Bonnie Michelle Smith (hereinafter "Smith") to quiet title to certain real estate located in Taylor County, Georgia. After being served with the complaint, Smith filed a petition to remove the action to the U.S. District Court for the Middle District of Georgia. Smith's alleged removal was predicated on four separate grounds, only one of which is relevant to the Petition for Writ of Certiorari, that being removal under 28 U.S.C. §1443.

In the pleadings filed at the time of the removal, Smith interposed a counterclaim. When the counterclaim remained unanswered for twenty (20) days, Smith requested and obtained a Clerk's Entry of Default.

After a hearing on multiple motions, U.S. District Court Judge Clay D. Land remanded the case to the Superior Court of Taylor County, relieved the MCN Club of the Clerk's Entry of Default and denied Smith's motion for a default judgment. Smith appealed to the U.S. Court of Appeals for the Eleventh Circuit.

On December 18, 2002, in a memorandum to counsel for both parties, the Clerk of the U.S. Court of Appeals for the Eleventh Circuit requested the parties to simultaneously advise the Court in writing with regard to the following jurisdictional question: "Whether the district court's November 15, 2002, order that: (1) granted the plaintiffs' motion to remand; (2) denied the plaintiffs' motion for costs, and (3) granted the plaintiffs' motion to set aside the clerk's entry of default is reviewable? (Cits. omitted)."

After receiving responses from counsel, the Court entered an order stating that Smith could proceed in part, specifically with regard to whether her "...civil rights were implicated and Federal officers were

named in the suit." The Court specifically found it lacked jurisdiction over the denial of Smith's motion for default judgment since such motion was not a final and appealable order.

The U.S. Court of Appeals for the Eleventh Circuit subsequently dismissed Smith's appeal as being frivolous on July 3, 2003. On August 6, 2003, the U.S. Court of Appeals for the Eleventh Circuit denied Smith's motion for reconsideration.

In the meanwhile, a motion for summary judgment was filed by the MCN Club in the Superior Court of Taylor County, Georgia, requesting that court to find that, under Georgia law, title to the real property in question was properly vested in the MCN Club. Smith filed a cross motion to dismiss the underlying action. The Superior Court of Taylor County entered two orders on the 17th day of February, 2004: one granted summary judgment in favor of the MCN Club, and a second order denied Smith's motion to dismiss.[1] (See Appendix, pages A-1 through A-7 and A-8 through A-11)

STATEMENT OF FACTS

Respondents Norma Alice Jones and Gaynell L. Pittman, acting in the respective capacities of President and Treasurer of an unincorporated association known as the Mauk-Charing-Norwich Community Club, claimed title to a piece of real estate in Taylor County, Georgia, known as the Old Mauk Schoolhouse. Smith also claimed title to the same property. The MCN Club maintained that the property had been deeded to the club in December of 1970; however, Smith, received a deed from the Taylor County School Board in May of 2002, which purported to deed the same property to her. A lawsuit

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1 The Superior Court of Taylor County issued an order granting summary judgment in accordance with the provisions of O.C.G.A. §9-11-56. As stated in O.C.G.A §9-11-56 9(h), an order granting summary judgment is subject to review by appeal. Such appeals, as stated in O.C.G.A. §5-6-34, may be taken to the Supreme Court of Georgia and the Court of Appeals of Georgia, subject to the appellate jurisdiction of each particular court.

was filed by the MCN Club under applicable Georgia law to determine title to the real property in question.

In addition to the above brief statement of facts, the MCN Club feels obligated to take issue with the statement produced by Smith. First and foremost, this case has absolutely nothing to do with civil rights. It has only to do with title to real estate in Taylor County, Georgia. While Smith may indeed be a new attorney who represents blacks and other minorities, the allegations she makes with regard to harassment and the burning of her family's home have never been substantiated. No competent evidence in that regard has ever been produced, at least not in to the hearing held in the U.S. District Court for the Middle District of Georgia on November 12, 2003.

The fraudulent deed argument made by Smith has been found false by the Superior Court of Taylor County, Georgia, which entered an order granting summary judgment to the MCN Club on their original and remanded title action. See Appendix, pages A-1 through A-7.

Although Smith continues to allege there is some racial bias involved in this case, no proof of any racial bias has ever been offered. Additionally, for what it is worth, Smith is white. More importantly, however, racial bias has never been a ground for removal of a case from a state court to the federal judicial system.

REASONS FOR DENYING THE WRIT

Before discussing the questions posed by Smith in her Petition for Writ of Certiorari, the MCN Club cannot help but suggest to the Court that this case simply does not meet any of the criteria set forth in Rule 10 of the Rules of the Supreme Court of the United States regarding considerations governing review on certiorari. There are no conflicting court of appeals decisions, conflicts with state courts of last resort or departures from accepted and usual courses of judicial proceedings which call for the exercise of this Court's supervisory power. No federal question has been decided by a state court of last resort. And no questions of federal law have been decided in any manner that conflicts

with prior cases decided by this Court. The case simply is not worthy of review by this Court. Further, as previously stated, the case has already proceeded to a final judgment in the state court.

Nonetheless, the MCN Club feels compelled to respond to Smith's questions presented for review.

I. The U.S. Court of Appeals for the Eleventh Circuit dismissed the Smith's appeal as being frivolous because it was frivolous.

Smith's first question assumes that her case was dismissed as being frivolous because the U.S. Court of Appeals for the Eleventh Circuit refused to determine whether 42 U.S.C. §1985(3) is an "equal civil rights" statute for purposes of removal. By the way her question is phrased, it is hard to determine if she argues that the case should not have been dismissed at all, or that it simply should not have been dismissed as being frivolous.

The reason that Smith's appeal to the U.S. Court of Appeals to the Eleventh Circuit was frivolous was quite simply for the reason that the case is squarely controlled by *Georgia v. Rachel*, 384 U.S. 780 (1966), as applied in *Alabama v. Conley*, 245 F. 3d 1292 (11th Cir. 2001).

In *Georgia v. Rachel*, *supra*, this Court set forth a two pronged test ("the *Rachel* test") for removal under 28 U.S.C. §1443 (1). Under the *Rachel* test, the removing defendant must show "both that the right upon which they rely is 'a right under any law providing for ...equal civil rights' and that they are 'denied or cannot enforce' that right" in state court. Id.

In *Alabama v. Conley*, *supra*, the U.S. Court of Appeals for the Eleventh Circuit considered an eminent domain action filed in state court wherein the State of Alabama sought to condemn parcels of land owned by the defendant. The defendant removed the case to federal court. The District Court granted the plaintiff's motion to remand and was affirmed by the U.S. Court of Appeals for the Eleventh Circuit.

In *Alabama v. Conley, supra*, the U.S. Court of Appeals assumed that 42 U.S.C. §1985(3) met the first prong of the *Rachel* test, but concluded that the statute did not contain any specific provision insulating defendant from a state's facially neutral eminent domain proceedings. The Court considered the exception to this rule, that being whether the very act of being a state court proceeding constituted a denial of rights conferred by federal statute.

Specifically, the U.S. Court of Appeals for the Eleventh Circuit found that, unlike the Civil Rights Act of 1964 which was at issue in *Rachel*, and which provided a specific right to trespass when making a peaceful effort to obtain service on an equal basis in restaurants and other establishments covered by the Act, no explicit prohibitions against proceedings in state courts based on the defendant's actions in state eminent domain proceedings was provided for in 42 U.S.C.§1985(3). There was simply no conflict between state eminent domain law and 42 U.S.C. §1985(3).

As set forth by Judge Land in his original opinion, it matters not whether 42 U.S.C. §1985(3) is an "equal civil rights" statute for the reason that under *Alabama v. Conley, supra*, Smith cannot satisfy the second prong of the *Rachel* test.

If this Court still holds to the definition set forth in *Barefoot v. Estelle*, 463 U.S. 80 (1983) indicating a case is frivolous if it is "squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case," then there is no question whatsoever that Smith's appeals in the U.S. Court of Appeals for the Eleventh Circuit were indeed frivolous.

Quite simply, *Alabama v. Conley, supra*, and the instant case are so strikingly similar, it is difficult to imagine a member of the bar not being able to readily conclude that an appeal of the District Court's order in the instant case would be anything other than frivolous under any definition of that term.

II. In order to reach Smith's second question, it must be erroneously assumed that no evidentiary hearing was held in the District Court.

It is specifically set forth in the order of U.S. District Court that a hearing was held on November 12, 2002. Either Smith is directly contradicting the District Court Judge by saying that no hearing was ever held, or she evidences such a complete lack of understanding of the rules of procedure that she does not realize that the opportunity to present evidence was afforded her, and that she was simply unprepared. The assertion that no hearing was held is simply false. The assertion that no opportunity to present evidence was given is equally false.

Since by agreement of counsel, no transcript of the proceedings was made, counsel for the MCN Club must rely on his own memory of the event. To the best of this counsel's memory, Smith called no witnesses. Smith did make long and impassioned argument before the Hon. Clay D. Land, Judge of the U.S. District Court for the Middle District of Georgia, and restated many of the allegations made in her complaint. Though counsel for the MCN Club does not remember Smith actually being sworn, it is common in the courts of State of Georgia for that which a member of the bar states in his or her place to be considered as if an oath had been taken. Any objective reading of the order entered by Judge Land would certainly show that he gave Smith the benefit of the doubt with regard to her allegations and statements made in the hearing.

And, contrary to Smith's contention, she did actually offer some admissible evidence in the District Court by affidavit. The record of the proceedings in the U.S. District Court for the Middle District of Georgia contains two affidavits, one of Smith herself and the other of one Cassandra Brown. It must be assumed that the U.S. District Judge reviewed these affidavits which were attached to the Smith's response to MCN Club's motion for remand.

III. The order relieving the MCN Club from default for failure to answer Smith's counter claim is a non-final order not subject to appeal.

In order to reach the Smith's third question, this court would have to determine it has jurisdiction over the denial of Smith's motion for a default judgment, a non-final order. The Court of Appeals decided under *Massachusetts Casualty Insurance Company v. Foreman*, 469 F.2d 259, 260 (5th Cir. 1972) (per curium) that it had no such jurisdiction. That Court was correct.

CONCLUSION

The ultimate question presented in the underlying lawsuit is who owns the Old Mauk Schoolhouse in Taylor County, Georgia. Such a question is not one for the federal courts. It is exclusively a state law question with no federal overtones. The original removal was appropriately remanded by the U.S. District Court Judge. The errors of which Smith's complained on appeal to the U.S. Court of Appeals for the Eleventh Circuit were indeed frivolous and the Court so recognized. The grounds for Smith's Petition for Writ of Certiorari are equally frivolous, and the writ should be denied.

Respectfully submitted,
W. Donald Morgan, Jr.
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APPENDIX

IN THE SUPERIOR COURT OF TAYLOR COUNTY
STATE OF GEORGIA

NORMA ALICE JONES, acting in her capacity as President, and Gaynell L. Pittman, acting in her capacity as Treasurer, of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor, Plaintiff,	:	Case No. 02-CV-132
vs.	:	
MICHELLE SMITH and TAYLOR COUNTY BOARD OF EDUCATION , Defendants.	:	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court, having considered the Pleadings, depositions and attached exhibits,[1] Plaintiffs' Motion for Summary Judgment and Brief, Defendant's Response and Brief, and Oral Arguments makes the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact and Conclusions of Law

The Plaintiffs, Norma Alice Jones and Gaynell L. Pitmann (sic), in their official capacity as officers of the Mauk-Charing-Norwich Community Club (herein Plaintiffs or MCN Club) filed this action in

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1 Defendant Smith's deposition was given to the Court before she had signed the deposition. The Court received the deposition and the accompanying exhibits as discovery documents with the understanding that Defendant Smith would submit an errata sheet listing any of her objections to its form.

Taylor County Superior Court on July 3, 2002 against Michelle Smith and the Taylor County Board of Education. Before filing an answer in the Taylor County Superior Court, Defendant Michelle Smith removed the case to Federal District Court, Middle District of Georgia. After finding the case was improperly removed, the Federal District Court remanded the case to the Taylor County Superior Court. On May 20, 2003, Defendant Smith filed an Amended Answer and Counterclaim. On December 30, 2003, the Plaintiffs filed a Motion for Summary Judgment and supporting brief with the Taylor County Superior Court. Defendant Smith filed a response to the Plaintiff's Motion for Summary Judgment on February 3, 2004. The Court conducted a hearing on February 5, 2004, where both parties were given an opportunity to present their arguments regarding the Plaintiff's Motion for Summary Judgment.

The law regarding summary judgments is codified in the Official Code of Georgia § 9-11-56. The law provides that if after viewing the evidence in a light most favorable to the non-moving party, here Defendant Smith, there is no genuine issue of material fact, and the Plaintiffs are entitled to a judgment as a matter of law, the motion should be granted and the judgment sought should be entered. On the other hand, if there remain substantial issues of fact, a party cannot be denied a trial by jury and the motion cannot be granted.

The Plaintiffs' Motion for Summary Judgment requests judgment on all the issues pending in this case. The Plaintiffs argue that there are no issues of material fact concerning the ownership of the Mauk Schoolhouse property, and that Defendant Smith has failed to provide sufficient evidence to withstand summary judgment on both her RICO and defamation counterclaims. The Taylor County Board of Education filed no objection to the Plaintiffs' Motion for Summary Judgment.

The first issue for determination by the Court is who is the record title owner of the Mauk Schoolhouse property. The parties have entered into evidence four separate deeds concerning the contested property. The first deed in evidence is a 1936 deed conveying the property to the Taylor County Board of Education; the second deed is a 1956 deed conveying the property from the Taylor County Board of Education

to the Plaintiff and creating a reversionary interest in the grantor; the third deed is a 1970 quitclaim deed conveying the remaining reversionary interest in the property to the Plaintiff; and the fourth deed is a 2002 quitclaim deed conveying the Taylor County Board of Education's interest to Defendant Smith.

The 1956 deed includes the following language: "The Taylor County Board of Education executes this indenture with the provision being in the event the Mauk-Charing-Norwich Community Club should cease to exist or in the event that said club should fail to hold regularly organized community club meetings for a continuous period of three years, ownership shall revert to the Taylor County Board of Education.[2]

The 1970 quitclaim deed conveyed from the Taylor County Board of Education to the Plaintiff "all right, title and interest in the Taylor County Board of Education." The language of the deed further clarifies its purpose is to convey the Taylor County Board of Education's reversionary interest to the Plaintiffs, so as to create full fee simple title in Plaintiff. The Plaintiffs also introduced uncontested evidence of the minutes taken at a Taylor County Board of Education meeting in late 1970 discussing the quitclaim deed and resolving to convey their reversionary interest in the Mauk Schoolhouse property to the MCN Club.

Defendant Smith argues that the 1970 deed is a fraud. However, she presents no evidence to overcome the presumption that a properly filed deed is presumed valid. Defendant Smith's only evidence is her own testimony that an anonymous caller telephoned her on the date the lawsuit was filed and told her that the Plaintiffs had manufactured

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2 A later paragraph in the 1956 deed states that the Plaintiffs will "have and to hold said bargaining premises under grantee and grantee's heirs and assigns together with all and singular rights, members and appurtenances there to the same, and any manner belonging to the owned property use and benefit and behoove the grantee and grantee's heir and heir assigns in fee simple." According to the cannons of constructions, when interpreting a deed, limiting language that is followed by a subsequent grant in fee simple voids the limitation language. Although neither party has presented this argument to the Court, the Court does not rule on it. However, the court does take this fact into consideration when making its decision.

a deed. However, aside from her self-serving statement, Defendant Smith failed to present any evidence to rebut the accuracy of the 1970 School Board minutes relating to the proposal and sale, and the numbered indexes and deed records placing the 1970 deed in correct chronological order. The Defendant Smith presented no evidence that the signatures on the deed were forged. In short, she presents no evidence that the recorded deeds should not be accepted as true and correct documents.

The Court finds that without a question of material fact concerning the 1970 deed, record legal title was in the Plaintiffs at the time the Taylor County Board of Education signed the 2002 deed conveying property to Defendant Smith. Because the Taylor county Board of education retained no property interest over the Mauk Schoolhouse at the time of the 2002 conveyance, they could convey no interest to the Defendant Smith The Court finds that there is no issue material fact for which a jury would need to decide concerning the ownership of the Mauk Schoolhouse property; therefore, the Plaintiffs are entitled to summary judgment as a matter of law on the title issue.

The second issue for determination is the Defendant Smith's counterclaim that alleges the Plaintiffs committed violations of the Georgia RICO Act codified in O.C.G.A. § 16-14-9. The law provides that an individual can bring a civil action against the members of an entity that has committed two predicate acts in violation of the statute. Defendant Smith alleges that the Plaintiffs committed burglary, arson and conspiracy as statutory –sanctioned predicate acts.[3] However, because she has provided insufficient evidence beyond her allegations, that create issues of material fact, Defendant Smith's claims cannot withstand summary judgment.

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3 In her counterclaim, Defendant Smith also alleges criminal trespass, mail fraud, criminal damage to property and stalking as racketeering activities. However, because these crimes are not listed as predicate acts in O.C.G.A. §16-14-3 of Georgia's RICO Act, they cannot be used to support her claim and are therefore inconsequential to the determination of the pending motion.

In support of her arson claim, Defendant Smith submitted an affidavit of Robert Drew, an expert in arson investigation, who investigated the fire which destroyed a home owned by a family corporation. Defendant Smith had no present ownership interest in the home or the family corporation. His affidavit implicates a member of the MCN Club, who is also a relative of the Defendant Smith, but does not state what facts the expert based his conclusion upon or how he came to those conclusions. No evidence was presented showing any perpetrators of the arson had been formally charged, indicted or convicted. Without a factual basis for his conclusion, Defendant Smith's expert witness statements are conclusory and are not sufficient to withstand Plaintiff's motion.

The Defendant also failed to provide the Court with any evidence proving a nexus between the Plaintiffs and the alleged crimes. The expert's affidavit that implicates a member of the MCN Club is too tenuous a connection to create material issues for jury determination.

Defendant Smith's contention that the Plaintiffs committed burglary as a predicate act to a civil RICO claim, must fail. Even if Plaintiff's club members broke into the Mauk Schoolhouse between June 20 and 25, 2002, and took items from inside, they could not have committed burglary. The Court has already determined in the Motion to Dismiss Order that the Plaintiffs were the rightful owners of the Mauk Schoolhouse at the time of the alleged burglary. No evidence was presented that the Plaintiffs had been charged, indicted, or convicted of the burglary. The Plaintiffs cannot be charged with committing a burglary on their own property. Therefore, the alleged predicate act of burglary cannot be used as the basis for a RICO action.

Defendant Smith presented no evidence of violation of any other predicate act even those predicate acts incorporated from the Federal RICO statute into the Georgia RICO statute.

Furthermore, Defendant Smith presented no evidence in support of her allegations of conspiracy between any perpetrators of any alleged predicate acts and any of the club members. For the foregoing reasons,

the Court finds there are no material facts for a jury to decide concerning Defendant's Smith's RICO allegation and Plaintiffs are entitled to summary judgment as to the RICO counterclaim as a matter of law.

The remaining issue concerns the Defendant Smith's defamation counterclaim. The counterclaim alleges that Norma Alice Jones made a slanderous statement on May 14, 2002 at a MNC Club meeting. The defamatory remarks allegedly stated that Defendant Smith stole the Mauk Schoolhouse property, misrepresented herself, was of poor moral character and lied about key federal statutes.[4] Defendant Smith's mother, Bonnie Harbuck, through an affidavit, offered the only evidence in support of the alleged defamation. The affidavit did not include specific details as to what was said by Ms. Jones, but merely stated that she heard defamatory statements made by Ms. Jones at the MCN Club meeting. The Court finds that because Ms. Harbuck's affidavit does not provide any factual basis for her conclusion, her statement is conclusory and is not sufficient evidence to survive Plaintiff's Motion for Summary Judgment. Defendant Smith offered no evidence that the Plaintiffs published libelous statements in support of her counterclaim.

Furthermore, the defamation claim was alleged against Ms. Jones as an individual, not in her official capacity as President of the MCN Club. Ms. Jones is only a party to the lawsuit as President of the MCN Club, and because Ms. Jones was not joined individually as a party to the suit, Defendant Smith's claim against her as an individual must fail. The Court finds that there are no issues of material fact that remain for jury determination regarding Defendant Smith's defamation counterclaim, and therefore the Plaintiffs are entitled to summary judgment as a matter of law.

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4 In her deposition, Defendant Smith admitted that someone could reasonably interpret her actions in the way Alice Norma Jones did at the MNC Club meeting.

ORDER

For the above-stated reasons, the Plaintiff's Motion for Summary Judgment is GRANTED as to all issues.

SO ORDERED this the 17th day of February, 2004.

/s/ Frank J. Jordan, Jr.
Judge of Superior Court
Chattahoochee Judicial District

IN THE SUPERIOR COURT OF TAYLOR COUNTY
STATE OF GEORGIA

NORMA ALICE JONES, acting in her capacity as President, and Gaynell L. Pittman, acting in her capacity as Treasurer, of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor, Plaintiff,	:	Case No. 02-CV -132
vs.	:	
MICHELLE SMITH and TAYLOR COUNTY BOARD OF EDUCATION , Defendants.	:	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

The Court, having considered the Pleadings, Defendant's Motion to Dismiss, Plaintiffs' Response to Defendant's Motion to Dismiss, Defendant's Reply to Plaintiffs' Response to Defendant's Motion to Dismiss and after having a hearing on February 5, 2004, makes the following Conclusions of Law and Order:

The Plaintiffs, Norma Alice Jones and Gaynell L. Pitmann (sic), in their official capacity as officers of the Mauk-Charing-Norwich Community Club (herein Plaintiffs or MCN Club) filed this action in Taylor County Superior Court on July 3, 2002. Before filing an answer in the Taylor County Superior Court, Defendant Michelle Smith removed the case to Federal District Court, Middle District of Georgia. After finding the case was improperly removed, the District Court remanded the case to the Taylor County Superior Court. On May 20, 2003, Defendant Smith filed an Amended Answer and Counterclaim. On December 31, 2003, Defendant Smith filed a Motion to Dismiss and supporting brief with the Taylor County Superior Court. On January 7, 2004, the Plaintiffs filed their Response to Defendant's Motion to

Dismiss. Defendant Smith filed a Reply to Plaintiff's Response to Defendant's Motion to Dismiss on February 3, 2004. The Court held a hearing on February 5, 2004, where both patties were given an opportunity to present their arguments regarding the Motion to Dismiss.

In her Motion to Dismiss, Defendant Smith presents four arguments why the Plaintiffs' claim should be dismissed with prejudice. Specifically, Defendant Smith argues 1) the Plaintiffs failed to state a claim upon which relief can be granted; 2) the Plaintiffs' pleadings were defective to bring an action under Quiet Title Act; 3) the Plaintiffs lacked standing to bring the action; and 4) Plaintiffs' attorney, Lovick Anthony, has a conflict of interest that so taints the proceeding that the case must be dismissed.

Defendant Smith's first argument is that the Plaintiffs failed to state a claim for which relief can be granted. The Georgia Supreme Court in *Bourn v. Herring*, 225 Ga. 67, 70 (1969), states "[a] motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any statement: of facts which could be proved in support of his claim. If within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient." In this case. the Plaintiffs frame their complaint as a request for declaratory judgment.

The Georgia Civil Practice Act specifically authorizes declaratory judgments in Official Code of Georgia, Annotated, Section 9-4-2(a), which states: "In cases of actual controversy, the respective superior courts of this state shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed; and the declaration shall have the force and effect of a final judgment and be reviewable as such." The legislature further authorized declaratory judgment in "any civil case in which it appears to the court that the declaration should be made." In Section 9-4-2(c), the law states "Relief by declaratory judgment shall be available, notwithstanding the fact that the complaining party has any other legal or equitable remedy."

Defendant Smith argues that despite the seemingly broad language of the declaratory judgment law, the Georgia Supreme Court limited its applicability in land title disputes in the case *Porter, et al.. v. Houghton*, 273 Ga. 407 (2001). In *Porter*, the Court held that the declaratory judgment was the inappropriate form of relief for a plaintiff seeking to establish that the siblings of his deceased wife had no interest in lands that were allegedly owned by the deceased at the time of her death. The Court held that the appropriate remedy would have been through the Georgia Quiet Title Act.

The case at bar, however, is substantially different from the *Porter* case. In *Porter*, the Court based its decision on the fact that the plaintiff failed to show that the declaratory judgment was necessary to relieve him of risk of taking some future action that without direction would jeopardize his interest. In the present case, the Plaintiff has sufficiently shown that failing to resolve the controversy created by the Defendant Smith's claim of ownership of the Mauk Schoolhouse, would put the Plaintiff at risk of both civil and criminal penalties related to reentry of the property in question.

The Court in *Porter* also stated that cases like the one before it that involve "record title to numerous tracts of land and multiple parties, declaratory relief will seldom, if ever, be available." The case at bar presents only two competing claims of ownership of a single property. The decision of the Court in *Porter* does not stand for the broad proposition that Defendant Smith asserts, that is, declaratory judgment is an inappropriate remedy for any case that could have been brought simultaneously under the Quiet Title Act. This Court finds the case law exemplified by the *J.M. Huber Corporation v. Georgia Marble Company*, 239 Ga. App. 271 (1999), to be more persuasive, which states "disputes concerning ownership of or right of access to land are classic candidates for resolution for declaratory judgment."

Defendant Smith's second argument assumes, *arguendo*, that because declaratory judgment is an inappropriate remedy in the case at bar, the Plaintiffs' only available remedy is though the Georgia Quiet Title Act. Because this court does not so hold, the failure of the Plaintiffs' action to meet the requirements of the Quiet Title Act are inconsequential. The Plaintiffs chose to bring the action as one for declaratory judgment,

and this Court finds that their prayer for relief is proper, so the court need not address this question.

The Defendant's third argument alleges that the Plaintiffs lack standing to bring the action. Citing In *Re Rivermist Homeowners Association, Inc.*, 244 Ga. 515 (1979), Defendant Smith argues that to withstand a motion to dismiss, the Plaintiffs must assert a claim of either current record title or current prescriptive title. The Plaintiffs brought suit to determine rightful use and possession of the property based on the recorded deeds in the Taylor County Courthouse, which would clearly be a claim of record title. There is undisputed evidence in the record that by a 1956 deed, the Taylor County Board of Education conveyed the Plaintiffs a property interest in the Mauk Schoolhouse. While the Defendant Taylor County Board of Education placed conditions upon the Plaintiffs' ownership in that deed, there is no argument that the Plaintiffs were not conveyed an interest in the property. A second deed in 1970 from the Board of Education to the Plaintiffs conveys "all right, title, and interest" in the Mauk Schoolhouse property. Because the Plaintiffs clearly have a property interest in the Mauk Schoolhouse, there are sufficient grounds to grant them standing in the present action.

Defendant Smith's final argument is that the Plaintiffs' attorney has a conflict of interest and as a result the case should be dismissed. The appropriate remedy for a situation where a party's counsel has a conflict of interest with an opposing party is to seek removal of the conflicted lawyer, not to dismiss the case. Defendant presented no evidence as to any conflict. Because the remedy that Defendant Smith's seeks is inappropriate, the Court does not need to further rule on the validity of her arguments.

For the above-stated reasons, Defendant Smith's Motion to Dismiss is hereby DENIED.

SO ORDERED this the 17th day of February. 2004.

/s/Frank J. Jordan, Jr.
Judge of Superior Court
Chattahoochee Judicial District

(4)

No. 03-948

Supreme Court, U.S.
FILED
MAR 15 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHELLE SMITH

Petitioner,

v.

NORMA ALICE JONES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Does a direct conflict exist between the 11th Circuit Court of Appeals' arbitrary dismissal of a case as frivolous and the U.S. Supreme Court's holding in Barefoot v. Estelle, 459 U.S. 1169 (1983) when the issue before the 11th Circuit of whether section 1985 (3) of 42 U.S.C. § 1985(3) classifies as an equal civil rights statute for the purpose of removal has not been squarely foreclosed by authoritative court decision because the issue before the 11th Circuit was one of first impression?

2. Does a direct conflict exist between the 11th Circuit Court of Appeals' holding that an arbitrary dismissal of a removed civil rights case to federal court is frivolous for lack of evidence on appeal when the District Court failed to require or allow an evidentiary hearing, in conflict with State of Georgia v. Rachel, 384 U.S. 780, 792 (1966)?

3. Does a direct conflict exist between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand?

RULE 29.6
STATEMENT AND INTERESTED PERSONS

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non-wholly owned subsidiaries.

The following persons have an interest in the outcome of this litigation: Lovick P. Anthony, Jr., Attorney for the Mauk-Charing-Norwich Community Club; Edward Davis, Attorney for the Taylor County Board of Education; Norma Alice Jones, President, Mauk-Charing-Norwich Community Club; Judge Clay Land, District Court Judge, Middle District of Georgia; Gregory J. Leonard, District Court Clerk, Middle District of Georgia; Mauk-Charing-Norwich Community Club; W. Donald Morgan; Attorney for the Mauk-Charing Norwich Community Club; Gaynell Pittman, Treasurer, Mauk-Charing-Norwich Community Club; Michelle Smith, Petitioner; Taylor County Board of Education.

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RULE

Fed. R. Civ. P. 12 7

REPLY TO BRIEF IN OPPOSITION

REASONS FOR GRANTING THE PETITION

Courts in Conflict Regarding Definition of a Frivolous Appeal

The respondents' brief states that the petitioners appeal was frivolous. However, that statement is conclusory. Respondents do not submit cases that provide clear guidelines in concluding that an appeal is frivolous. A frivolous appeal is defined as one that pursues legal points not arguable on the merits. Ozee v. American Council on Gift Annuities, Inc. 110 F.3d 1082, 1097 (5th Cir. 1997). Appeal based on colorable reading of case law is not frivolous. Edwards v. Cass County, 919 F.2d 273, 276 (5th Cir. 1990) Some courts admit that they cannot easily define that which is frivolous. "Frivolity, like obscenity, is often difficult to define." WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983) A weak appeal is not a frivolous appeal. Hetreed v. Allstate Ins. Co. , 135 F.3d 1155, 1158 (7th Cir. 1998).

The Lower Court conclusively determined that the appeal was frivolous even though the appeal was based on a colorable reading of case law. Further, even the 7th Circuit determined that a weak appeal was not frivolous. Hetreed v. Allstate Ins. Co. , 135 F.3d 1155, 1158 (7th Cir. 1998).

The conflict regarding the definition of frivolous appeals is significant because it has far-reaching legal and practical effects. Many cases are without proper

redress. A Court of Appeals should have the authority to clear out its docket but not at the expense of dismissing claims without first ascertaining whether or not there are arguable legal merits not clearly foreclosed by case or statute. Further, many appeals are appeals of first impression, while many appeals call for the Court of Appeals to overturn its previous holding to create new case law.

Even the respondents in their brief in opposition acknowledge on page 3 of their brief that the case involves racial bias, which is an issue of first impression. Therefore, if the case is one of first impression, how can a case be arbitrarily dismissed as frivolous without some clear litmus test as to what is in fact frivolous?

Without clear guidelines regarding how a case is deemed frivolous, the dismissal of many worthy appeals as frivolous will proceed because these appeals have no final redress. A direct conflict exists between the 11th Circuit and Barefoot v. Estelle. The Supreme Court has stated that an issue is frivolous if it "squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case." Barefoot at 894.

The 11th Circuit has not specifically addressed whether 42 U.S.C. § 1985(3) qualifies as "an equal civil rights" statute. Alabama v. Conley, 245 F.3d 1292, 1296 (11th Cir. 2001). Because the 11th Circuit had not specifically addressed whether § 1985(3) qualifies as an equal civil rights statute, the issue in the present case was one of first impression. Since it was a case of first

impression, then the 11th Circuit's ruling as frivolous was in direct conflict with the Barefoot opinion.

Decision Not to Have an Evidentiary Hearing Incorrect

Respondents state that a hearing was held; they do not deny that an evidentiary hearing should have been held. Yet in fact, no evidentiary hearing was held. Oral arguments were held regarding the motions on the court docket: a motion for default judgment, a motion to overturn clerk's entry of default, and a motion for remand. No court reporter was present because the court did not order one to be present. If the court had intended for the oral argument to be an evidentiary hearing, then the court would have ordered a court reporter present. Petitioner did agree to proceed with oral arguments without a court reporter after Judge Lands informed the parties that they would have to reschedule the argument. At no time did the petitioner take the witness stand and at no time did the respondent cross examine the petitioner. The oath that the respondent refers to is the oath that every lawyer takes when sworn in to practice law, not an oath sworn to in this case. At no time, did an oath take place in this case.

Without an evidentiary hearing, the District Court could not properly determine whether there was sufficient evidence to sustain or deny removal. The court called the petitioner's attention to the Rules of Evidence. But per the persuasive precedent of the 7th Circuit in Borowski v. DePuy, Inc., 850 F.2d 297, 306 (7th Cir. 1988), the petitioner cannot supplement the

record with documents that were not part of the district court record.

Petitioner/Defendant/Smith (Smith) asked the District Court for permission to present evidence of the Club Members committing arson to the defendant's home place at the oral argument on November 12, 2002, but Smith's request to present the evidence from the certified arson investigator was denied both as to presenting the evidence in open court or in chambers. There is no record of this conversation from the case record because no court reporter was present at the oral argument. The court did ask Smith if the incidents and the evidence she had obtained through a private arson investigator and forensic document examiner had been turned over to the appropriate authorities. Smith replied that the evidence had been turned over to the Federal Bureau of Investigations as well as the United States Attorney's Office.

A direct conflict exists with the 11th Circuit Court of Appeals and State of Georgia v. Rachel, 384 U.S. 780, 792 (1966) because Rachel requires a hearing to establish the evidence sufficient to sustain removal. The District Court did not hold an evidentiary hearing and the 11th Circuit in direct conflict with Rachel dismissed this argument.

Smith did not present the information of the conversation between Smith and the District Court Judge from the November 12, 2002 hearing to the 11th Circuit Court of Appeals because this information had never appeared in the record previously, and to do so would have been frivolous. The defendant at all times

was deferential and conscientious in her respect to the court by not submitting information to the court that had not previously been incorporated into the District Court Record either by sworn statements of affidavits or court transcript.

The decision to not have an evidentiary hearing is incorrect. This particular case squarely presents the inherent conflict of not having an evidentiary hearing before making a ruling regarding a remand from a civil rights removal. Respondents state that this case was not worthy of removal, but this case is exactly the type of case that warrants removal. The respondents attach copies of the latest Superior Court Case that proceeded contemporaneously with this appeal due to the case's remand back to Taylor County Superior Court. These orders were not part of the District Court record and as such should not be considered as any type of evidence.

However, since the respondents have opened the door regarding the presentment of the Superior Court Proceedings, the petitioner submits that what happened at the Taylor County Superior Court Proceedings are exactly why the case should have been removed to Federal Court. During the proceeding, Smith was not allowed to argue any points regarding the arson of her 100 year old historic family home place. Smith was not able to present this information because the Judge prohibited it, but because Smith and Smith's supporters were threatened at the oral argument in Taylor County Superior Court in Butler, Georgia.

The threat was so severe that the Sheriff and two deputies escorted Smith out of the court room and out of the county after the ruling. Smith's life was threatened, and those of her black supporters. Smith was forced to not detail the name of the arsonist in open court because if she did so, she would be "popped as soon as she leaves the courthouse." The threat was clear --- if you present your case in a certain way, then you and your black supporters will be killed. The threat was so credible that the Sheriff allowed a private civilian to enter the courtroom with a gun to assist in protecting Smith with the Sheriff's armed officers.

The country is still polarized by racial bias and racial divide. The present case shows how polarized one community is in regards to race. Taylor County may be a novelty with its dual black and white proms, but it is hardly a novelty with racial prejudice. Racial prejudice exists throughout the country and many times the only way even handed justice comes is by a defendant removing a case to federal court pursuant to his or her civil rights.

This Court should clarify by a bright line ruling whether or not Rachel in fact requires an evidentiary hearing prior to a court making a determination to remand. Without a definitive ruling, many removed cases based on civil rights will be remanded back without a hearing to properly determine whether or not the cases established an adequate evidentiary burden to stay in federal court under the civil rights statute.

A Motion to Remand Does Not Toll the Answer of a Counterclaim

A direct conflict exists between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand. The Federal Rules of Civil Procedure do not toll the answer of a counterclaim when filing a motion to remand. Default by reckless disregard for judicial proceedings should preclude the finding of relief from the default, and further warrants a default judgment.

In the present case, the entry of default and default judgment are warranted because the club disregarded FRCP 12 by failing to file an answer to the counterclaim, and otherwise exhibited a calculated, callous, willful, reckless, deliberate disregard for the judicial process. The 11th Circuit Court of Appeals has noted that if a party willfully defaults by displaying either an intentional or reckless disregard for the judicial proceedings, the court need make no other findings in denying relief. Compania Interamericana v. Compania Dominicana, 88 F.3d at 951-952 (11th Cir. 1996) At the time of the default, removal was proper.

The Federal Rules of Civil Procedure do not toll the answer of a counterclaim when filing a motion to remand. If a Court of Appeals can supercede the Rules of Civil Procedure, then there is no continuity and stability for all judicial proceedings. A counterclaim cannot establish jurisdiction in federal court. But until

jurisdiction is found to be incorrect by the court by an order of remand, then jurisdiction is proper and an answer is required.

When an answer is not filed and default is entered, the default should stand irregardless of whether or not the case is remanded back to another jurisdiction. At the time of the default, jurisdiction is proper. To rule or hold otherwise under scores the necessity for strict rules within the judicial process.

This Court should affirmatively state that a motion for remand does not toll the Federal Rules of Civil Procedure in answering a counterclaim. This Court does have jurisdiction to affirmatively state whether or not a motion to remand tolls the answering of a counterclaim.

CONCLUSION

Smith is a new attorney who has risked her life to fight for the rights of minorities and the rural poor. She has been discriminated against and permanently prejudiced in the Georgia Superior Court because of her work with civil rights and black clients. Smith has lost her historic 100 year old family home place by arson. The leading arson investigator in the Southeast determined the arsonist to be a member of respondents' organization. A rattlesnake was placed in Smith's office. Smith was unable to present her case in a certain way, to her prejudice, because of overt threats of violence based on racial bias and prejudice.

No, contrary to the respondents assertion, this case is not merely about the ownership of a building. This case, and others similar to it, is about much more. The petition raises issues of law that warrant review by this Honorable Court. The petition for a writ of certiorari should be granted.

Respectfully Submitted.

/s/ Michelle Smith

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